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No. 73-252

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, ET AL., PETITIONERS

*v.*

H. MEDILL SARKISIAN

UNITED STATES OF AMERICA, PETITIONER

*v.*

ONE PACKAGE OF ANTIQUES AND INDIAN JEWELRY

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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### STATEMENT OF THE CASE

For present considerations only, we will accept the factual statement set forth in the government's petition. However, by so doing, we do not agree that the Record supports certain factual assertions therein.

This position is adopted because in our view certiorari is not designed for the review of factual determinations.

Accordingly, the failure of the government's contention that Respondent Sarkisian was responsible for the administrative delay in the court below is not considered herein except by passing observation that Respondent Sarkisian did not petition for remission or mitigation under 19 U.S.C. §1618.

## ARGUMENT

THE PETITION HEREIN DOES NOT DISCLOSE THE EXISTENCE OF SPECIAL OR IMPORTANT REASONS TO JUSTIFY GRANTING CERTIORARI.

From its petition the government here appears to assert that certiorari should be granted for essentially two reasons: (1) the court of appeals' misapplication of a prior decision of this Court, *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971); and (2) the effect which the decision below might have upon administrative activities of the Bureau of Customs. We contend that neither claim involves a special or important reason justifying certiorari consideration by this Court.

### A. The Decision Below Was Not Fraught With a Misunderstanding of the Law.

In *Thirty-Seven (37) Photographs* this Court labored to eliminate administrative delay as a form of censorship. The court below properly applied similar philosophy to remedy an administrative delay which resulted in the confiscation of Respondent Sarkisian's property.

The government's unprecedented argument that First Amendment and Fifth Amendment involvements require different results ignores the obvious parallels when viewed in the present context. The court below aptly responded by observing:

> The withholding of Sarkisian's property under the circumstances before us presents a constitutional claim of no less dignity than that arising from dirty pictures. *Sarkisian v. United States*, 472 F.2d 468, 472 (10th Cir. 1973).

Legislative history considerations add no support to the government's contentions. 19 U.S.C. §1618 affords the right *but not the obligation* to petition the Secretary of the Treasury for administrative relief in the nature of remission or mitigation of fine, penalty or forfeiture. Thus Congress did not make administrative review mandatory but left its initiation to the person aggrieved.

The Record here discloses that review was invoked by the administrative agency itself in "treating" Respondent's inquiry letter as a petition for remission or mitigation (Tr. 27, 149-50; see also Government's Petition herein, p. 9). The court below properly disposed of the government's factual contention that its delay was caused by Respondent Sarkisian's acts. His efforts were aimed at speeding up the determination of government's forfeiture claim, not delaying it. This is evidenced by *his* initiation of judicial intervention after twelve months of administrative shuffling.

Actually the congressional intent here is more manifest than in the obscenity situations. The obscenity provision, 19 U.S.C. §1305, does not include accelerative language comparable to that in 19 U.S.C. §§1602 and 1604 involved here. Even against the government's then urging that the later-cited sections furnished sufficient time limits in obscenity cases, this Court expressly observed that they did not. *United States* v. *Thirty-Seven (37) Photographs, supra* at 368, 91 S.Ct. at 1404 (fn. 2). The contention that the administrative process may, because 19 U.S.C. §1603 does not require prompt reporting to the United States attorney, delay conclusive determination indefinitely is constitutionally unfathomable. Congress' use of the terms "immediately" "forthwith" and "without delay" in Sections 1602 and 1604 manifested its clear intent to abbreviate the time between seizure and forfeiture determination to thus avoid an unconstitutional deprivation of the use and enjoyment of property.

The government's suggestion that the general five-year forfeiture statute of limitations of 19 U.S.C. §1621 extends administrative processing time overlooks the fact that such

section is equally applicable to obscenity forfeiture provisions and is constitutionally offensive in either instance.

Accordingly, the self-invoked administrative processes and the government's unjustified delay here clearly demanded the results below and elicit no question of importance for present consideration by this Court.

**B. The Fears of the Bureau of Customs Do Not Warrant Certiorari.**

The government's claim that the decision below might disrupt the administrative processing of customs seizure overlooks several significant considerations. First, the constitutional right to the enjoyment of property cannot be made subservient to bureaucratic procedures. Second, Respondent Sarkisian did not initiate administrative processing, such procedures were not required and the processing here was inexcusably protracted.

The Record here amply reflects that Respondent Sarkisian was aggrieved by the self-invoked "administrative relief" procedures and, in obvious desperation himself went to court for relief.

We find neither logic nor precedent for certiorari being used as a means to allay the fears of a governmental agency that a court decision against it might compel more efficient operation on its part. Even government counsel and one of the trial court judges below were constrained to observe in open court that it was difficult to get customs to act (Tr. 4-9, Hearings of July 17, 1970).

Careful consideration of and adherence to the decision below, *Thirty-Seven (37) Photographs* and the applicable statutory provisions would lead customs into avoiding unfavorable future results. We suggest that in the future customs give formal notice that by seeking administrative remission or mitigation the petitioner thereby waives speedy trial rights. Additionally, Customs must obviously act more expeditiously than it did here. Prompt referral to prosecuting officers would

be unnecessary providing that persons aggrieved by seizures intentionally and knowingly initiate administrative consideration and thus waive their rights to prompt judicial determination and providing, further, that the Customs Bureau, itself, act with reasonable dispatch.

Accordingly, we submit that the expressed fears of Customs are easily soluble and do not require either the time or attention of this Court.

## CONCLUSIONS

For the above and foregoing reasons we submit that the Petition for Writ of Certiorari does not raise questions of sufficient magnitude or importance for consideration by this Court and that the decision below was both well-reasoned and legally sound. Accordingly, we urge that the Petition for Certiorari be denied.

Respectfully submitted,

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